

Law Offices

VUONO & GRAY, LLC

2310 Grant Building

Pittsburgh, PA 15219-2383

John A. Vuono
William A. Gray
Mark T. Vuono*
Dennis J. Kusturiss
Christine M. Dolfi
Louise R. Schrage
Susan C. Indrisano+
*Also Admitted in Florida
+Also Admitted in Maryland

Richard R. Wilson
of Counsel

Telephone
412-471-1800

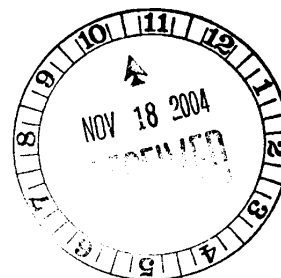
Facsimile
412-471-4477

November 17, 2004

Re: STB Finance Docket No. 34608 – Ohio Valley Railroad Company and Mid-America Locomotive and Car Repair, Inc. – Petition for Expedited Relief for Service Emergencies Pursuant to 49 C.F.R. §§ 1146 and 1147

Hon. Vernon A. Williams
Secretary, Surface Transportation Board
Mercury Bldg., #711
1925 K Street, N.W.
Washington, D.C. 20423-0001

212571



Dear Sir:

Enclosed for filing please find the original and ten copies of the Motion to Strike Reply and Rebuttal Statement of Ohio Valley Railroad Company and Mid-America Locomotive & Car Repair, Inc.

Copies of this pleading have been served on all parties of record.

Please date stamp and return a copy of this letter in the enclosed self addressed, stamped envelope to indicate the Board's receipt of this pleading.

Very truly yours,

VUONO & GRAY, LLC

Richard R. Wilson, Esq.
Attorney for Ohio Valley Railroad Co. and
Mid-America Locomotive & Car Repair, Inc.

ENTERED
Office of Proceedings

NOV 18 2004

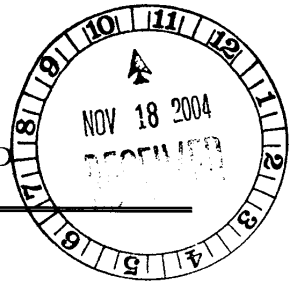
Part of
Public Record

RW/bab

Enclosures

xc: David Konschnik, Director – Office of Proceedings
All Parties of Record

21257
BEFORE THE SURFACE TRANSPORTATION BOARD



FINANCE DOCKET NO. 34608

**OHIO VALLEY RAILROAD COMPANY
-ACQUISITION AND OPERATION EXEMPTION-
HARWOOD PROPERTIES, INC.**

**MOTION OF OHIO VALLEY RAILROAD COMPANY TO STRIKE THE REPLY OF
INDIANA SOUTHWESTERN RAILWAY COMPANY TO THE PETITION FOR
EXPEDITED RELIEF FOR SERVICE EMERGENCIES AND ALTERNATIVELY
PETITIONERS' REBUTTAL THERETO**

ENTERED
Office of Proceedings

NOV 18 2004

Part of
Public Record

Richard R. Wilson, Esq.
Vuono & Gray, LLC
2310 Grant Building
Pittsburgh, PA 15219
412-471-1800
Attorney for Ohio Valley Railroad
and Mid-America Locomotive and
Car Repair, Inc.

Dated: November 17, 2004

BEFORE THE SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34608

**OHIO VALLEY RAILROAD COMPANY
-ACQUISITION AND OPERATION EXEMPTION-
HARWOOD PROPERTIES, INC.**

I. MOTION OF OHIO VALLEY RAILROAD COMPANY TO STRIKE THE REPLY
OF INDIANA SOUTHWESTERN RAILWAY COMPANY TO THE PETITION FOR
EXPEDITED RELIEF FOR SERVICE EMERGENCIES

Ohio Valley Railroad Company ("OVR") and Mid-American Locomotive & Car Repair, Inc. ("Mid-America") file this Motion to Strike the Reply of Indiana Southwestern Railway Company ("ISW") to the Petition of Expedited Relief for Service Emergencies filed with the Surface Transportation Board on November 15, 2004 and in support thereof state as follows:

1. As indicated in the Reply of OVR and Mid-America to the Motion for Extension of Time filed with the Board on November 16, 2004, both ISW's Motion for Extension of Time to respond to the Petition for Expedited Relief and its subsequent Reply thereto are untimely filed. The ISW Reply was required to be filed with the STB no later than October 29, 2004. On November 12, 2004, thirteen days after ISW's Reply to the Petition for Expedited Relief was to be filed with the Board, counsel for ISW sought an additional twenty days in which to respond to that Petition for Expedited Relief. The Board's Rules of Practice at 49 C.F.R. §1104.6 explicitly state that "documents must be received for filing at the Board's office in Washington, DC within

the time limit set for filing.” The reason for this rule is obvious but it is particularly pertinent in the case of a Petition for Expedited Relief for Service Emergencies such as that created by ISW which precludes the ability of OVR to provide common carrier rail service by virtue of ISW’s unilateral removal of switch connections with OVR’s rail facilities.

Moreover, having missed the filing deadline required by 49 C.F.R. §1146.1 (b)(2) and having sought Board permission to late file its Reply, ISW has nonetheless filed its Reply without permission from the Board two weeks after the due date for that pleading. ISW should not be able to ignore the Board’s procedural rules for its own convenience.

Accordingly, Petitioners respectfully request that the Board strike the Reply of ISW for noncompliance with the Board’s Rules of Practice.

II. REBUTTAL STATEMENT OF OVR AND MID-AMERICA TO THE
REPLY OF ISW

OVR and Mid-America submit the following rebuttal statement in response to the allegations and assertions contained in the ISW Reply filed with the Board on November 15, 2004. Much of the material contained in the ISW Reply is merely a reassertion of prior pleadings pertaining to ISW’s challenge to OVR’s Notice of Exemption to operate as a common carrier railroad. However, the Board will note that ISW does not present a consistent argument in its various pleadings. On the one hand ISW asserts that OVR is not a common carrier and yet at page 3 of its Reply it notes that Mid-America is not a customer of ISW rather, OVR is its carrier. It further asserts that the car which is presently trapped had not been way billed and it was a passenger car to be moved on its own wheels and therefore should not be subject to railroad billing. However, ISW has it

backwards. Instrumentalities of transportation being utilized by common carrier railroads in interstate commerce are at times subject to movements. Railroad equipment moving on its own wheels such as the passenger car in question is considered to be property and subject to transportation charges under railroad common carrier publications. See Missouri Pacific R.R. Co. and Consolidated Rail Corp. – Petition for Declaratory Order – Recovery of Transportation Charges, 1988 Lexis 321 (1988). Moreover, the fact that ISW did not receive a way bill is directly related to the fact that ISW removed its switch connections with OVR before the waybill could be issued and before OVR could fully complete its arrangements to initiate common carrier rail service and negotiate interchange arrangements with ISW.

Moreover, ISW's assertions that the two switches removed were never interchange tracks ignores the fact those tracks became instrumentalities of transportation subject to the jurisdiction of the Board upon the effective date of OVR's Notice of Exemption, notwithstanding ISW's challenge to that Notice of Exemption. None of the excuses offered by ISW for its removal of its switch connections with OVR provide any justification for the violation of its statutory obligations under the ICC Termination Act to provide reasonable facilities for interchange of traffic and to provide for continuous carriage of freight between origins and destinations.

Having unilaterally and illegally removed the connecting switches with OVR's track facilities, ISW now complains that OVR has made no reasonable attempt to resolve this matter when in fact OVR provided ISW with an opportunity to reinstall these switches and to resolve any other concerns which ISW purportedly had regarding interchange operations with OVR before bringing this matter to the attention of the STB.

As the Board is well aware, ISW's removal of the OVR switch does not occur in isolation. ISW has repeatedly sought to challenge OVR's Notice of Exemption in Finance Docket No. 34486 and has refused to recognize access easements related to OVR and Mid-America's property which has necessitated a Petition for Declaratory Order in Finance Docket No. 34599 in connection with a state court proceeding. Finally, the service emergency created by ISW does not relate merely to a single rail car. As recently indicated by correspondence filed on behalf of OVR within the last week, Mid-America has the opportunity to service and repair eighty gondola cars but will be unable to do so as long as ISW refuses to reinstall switch connections and negotiate appropriate interchange arrangements with OVR.

ISW's allegations regarding safety are also without merit. The proposals by OVR to interchange with ISW or, in the alternative, with CSXT are based on interchange operations which would take place within Harwood Yard and not on yard tracks operated by ISW. Thus there would be no serious interference with ISW's ability to provide service to its customers. Indeed, ISW's comments regarding very limited yard space in Evansville, Indiana provide further insight into its attempt to obstruct OVR's rail operations within Harwood Yard which ISW repeatedly tried to acquire from Mid-America and Harwood Properties, Inc. in order to obtain additional yard facilities.

Furthermore, the credibility of certain assertions made in the ISW Reply statement must also be addressed. ISW claims that it was justifiably concerned that OVR might attempt to come out on ISW tracks without authority, thus creating a dangerous situation. What ISW does not state is that in order come out onto ISW tracks, ISW would have had to unlock the switch locks which secured the ISW switches into OVR's rail yard. Neither

OVR nor Mid-America had any access to the keys for those switch locks. Given the fact that ISW kept its switches locked , its claims regarding “justifiable concerns” are a little more rhetorical posturing which should be accorded no credence by the Board.

The provisions of the ICC Termination Act of 1995 which require carriers to provide reasonable facilities for interchange of traffic and for continuous carriage of freight are fundamental and essential to a national rail transportation system. If common carrier railroads are free, for whatever reason, to unilaterally remove track connections with other common carrier railroads as the means of denying those railroads access to the national rail transportation system, the entire system will collapse. It was to avoid these types of high handed tactics that the Interstate Commerce Act was first passed in 1887 to provide a set of ground rules to assure efficient interline rail operations. Unfortunately, from time to time certain parties must be reminded of these fundamental transportation policies to assure that the national rail transportation system continues to function in a connected and coordinated fashion. OVR and Mid-America’s Petition presents such a case and the Board should move quickly to address ISW’s efforts to prevent OVR’s entry into the rail transportation marketplace.

Respectfully submitted,

VUONO & GRAY, LLC

By:



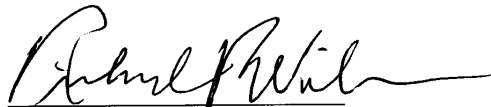
Richard R. Wilson
Attorney for Ohio Valley Railroad
Company and Mid-America
Locomotive and Car Repair, Inc.

CERTIFICATE OF SERVICE

Richard R. Wilson, Esq., attorney for Ohio Valley Railroad Company and Mid-America Locomotive and Car Repair, Inc., hereby certifies that on the 17th day of November, 2004, he did serve a true and correct copy of the foregoing Reply to ISW's Motion for Extension of Time upon the following counsel of record, by first class mail, postage prepaid, at their offices as set forth below:

Louis E. Gitomer, Esq.
Ball Janik, LLP
1455 F Street, N.W.
Suite 225
Washington, D.C. 20005

Daniel A. LaKemper, Esq.
General Counsel
Indiana Southwestern Railway Co.
1318 S. Johanson Road
Peoria, IL 61607


Richard R. Wilson, Esq.